Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1997

THE CHASE MANHATTAN BANK,
as Trustee of the IBM Retirement Plan Trust Fund,

Petitioner,

v.

CITY & COUNTY OF SAN FRANCISCO; SAN FRANCISCO BOARD OF SUPERVISORS; ASSESSMENT APPEALS BOARD FOR THE CITY AND COUNTY OF SAN FRANCISCO; DORIS WARD, Tax Assessor for the City and County of San Francisco; THAD BROWN, Tax Assessor; BRUCE JAMISON, County Recorder; GREG DIAZ, Acting County Recorder for the City and County of San Francisco,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Tax Injunction Act, 28 U.S.C. § 1341, provides that federal courts do not have jurisdiction to hear challenges to local taxes where the plaintiff has a "plain, speedy and efficient" remedy in state court.

The Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"), provides that: "district courts of the United States shall have exclusive jurisdiction of civil actions under [ERISA] brought by . . . [a] fiduciary . . . "

Petitioner, as trustee of an ERISA-regulated pension trust, seeks a declaration that defendants' methods of imposing taxes on a transaction regulated by ERISA are pre-empted by ERISA. The United States Court of Appeals for the Ninth Circuit held that petitioner could bring this action in the state court, and therefore, because of the Tax Injunction Act, petitioner could not bring this action in federal court.

The first question presented is: Does an ERISA trustee have a plain, speedy and efficient remedy to challenge the method of imposition of a local tax on a transaction regulated by ERISA by bringing a civil action under ERISA in state court, in view of ERISA's grant of exclusive jurisdiction of that action to the federal courts?

The Ninth Circuit also held that petitioner had a plain, speedy and efficient remedy in state court because petitioner could cause another entity, which is not an

QUESTIONS PRESENTED – Continued

entity mentioned in ERISA, to bring an action under ERISA in state court.

The second question presented is: Can an entity which is not an ERISA beneficiary, participant or fiduciary bring an action under ERISA in state court?

PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

All parties to the proceeding in the Ninth Circuit (whose judgment is sought to be reviewed) are contained in the caption of this Petition. Petitioner The Chase Manhattan Bank is a wholly-owned subsidiary of Chase Manhattan Corporation, shares of which are publicly traded. The Chase Manhattan Bank, in its capacity as Trustee of the IBM Retirement Plan Trust Fund, has no subsidiaries or affiliates which have issued shares to the public.

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PETITION FOR WRIT OF CERTIORARI

Petitioner The Chase Manhattan Bank, as Trustee of the IBM Retirement Plan Trust Fund, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on August 18, 1997 (rehearing denied October 2, 1997) in order both to resolve the conflict between that decision and the decisions of the United States Courts of Appeals for the Second, Fifth, Sixth, Eighth and Eleventh Circuits and to resolve the conflict between the Ninth Circuit's decision and the relevant decisions of the United States Supreme Court.

CITATIONS OF REPORTS OF OPINIONS

The judgment of the District Court for the Northern District of California in this matter was entered on June 18, 1995, and is not reported officially. A copy is in the Appendix hereto, pages 11 to 14. A copy of the transcript of the District Court's oral announcement of his decision is in the Appendix hereto, pages 17 to 66. The decision of the United States Court of Appeals for the Ninth Circuit is reported at 121 F.3d 557 (9th Cir. 1997). A copy is in the Appendix hereto, pages 1 to 10. The order denying rehearing is not publicly reported. A copy is in the Appendix hereto, pages 15 to 16.

BASIS FOR JURISDICTION

The order of the Ninth Circuit sought to be reviewed was entered on August 18, 1997. The order of the Ninth Circuit denying rehearing was entered on October 2, 1997. This Court has jurisdiction to review the order of the Ninth Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THE CASE

The statutes involved in the case are ERISA, specifically 29 U.S.C. § 1132(e), which provides:

> "district courts of the United States shall have exclusive jurisdiction of civil actions under [ERISA] brought by . . . [a] fiduciary . . . "

and the Tax Injunction Act, 28 U.S.C. § 1341, which provides:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

Other relevant sections of ERISA are set forth in the Appendix hereto, pages 67 to 77.

STATEMENT OF CASE

This dispute involves the imposition of substantial property taxes on an office building in San Francisco called One Market Plaza. Title to the property was in the name of a common law joint venture, also called One

Market Plaza; the majority, and later, all of the beneficial interests in One Market Plaza, the joint venture, were owned by The Equitable Life Assurance Society of America, but placed by Equitable in a "separate account" for the benefit of petitioner. A separate account is a creature of state insurance law designed to allow insurance companies to offer certain contractual investments to trustees of pension funds. The creation of this particular separate account was heavily regulated by ERISA. For example, ERISA required that the consideration paid for the creation of the separate account be reviewed for fairness by the United States Department of Labor, and all of the details of the transaction were publicly disclosed in the Federal Register. Nonetheless, defendants valued the property at $130 million more than the value approved by the Department of Labor, and, accordingly, imposed substantial additional taxes on the property. They also imposed $5 million in fraud penalties for failure to file a particular disclosure document with San Francisco.

Petitioner filed this action in the United States District Court for the Northern District of California, seeking a declaration that the actions of defendants in imposing additional property taxes because of the creation of the separate account were pre-empted by ERISA. Petitioner relied on ERISA, 29 U.S.C. § 1132(e), which provides: "district courts of the United States shall have exclusive jurisdiction of civil actions under [ERISA] brought by . . . [a] fiduciary . . . " as the basis for jurisdiction in the federal district court.

Defendants filed a motion to dismiss under Federal Rule of Civil Procedure 12(b), asserting that the federal courts did not have jurisdiction to hear this case because

of the Tax Injunction Act, 28 U.S.C. § 1341. By its terms, the Tax Injunction Act deprives the federal courts of jurisdiction to hear challenges to local taxes only where the plaintiff has a plain, speedy and efficient remedy in state court. Petitioner argued that it did not have *any* remedy in state court because of ERISA's grant of *exclusive* jurisdiction to the *federal* courts. The district court disagreed and granted the motion to dismiss.

The Ninth Circuit affirmed, on the dual grounds that (1) petitioner could bring this action in state court and (2) petitioner could cause One Market Plaza, the joint venture, to pursue the claim of ERISA pre-emption in state court. The Ninth Circuit concluded that petitioner had a plain, speedy and efficient remedy in state court, and affirmed the district court's judgment that the Tax Injunction Act bars this case.

ARGUMENT FOR ALLOWANCE OF THE WRIT

1. The Ninth Circuit's Decision Is In Conflict With The Decisions Of The Second, Fifth and Sixth Circuits On The Question Of Jurisdiction Of Federal Courts To Hear A Claim Challenging Local Taxation Under ERISA Brought By An ERISA Trustee

As noted above, the first question presented is: Does an ERISA trustee have a plain, speedy and efficient remedy to challenge the method of imposition of a local tax on a transaction regulated by ERISA by bringing a civil action under ERISA in state court, in view of ERISA's grant of exclusive jurisdiction of that action to the federal courts?

A writ of certiorari should issue in this case, under Rule 10(a) of the Rules of this Court, because the Ninth Circuit has issued a decision conflicting with the decisions of three other Circuit Courts of Appeals on this question.

As actually noted in the Ninth Circuit's opinion in this case (Appendix, page 7), the Second, Fifth and Sixth Circuits all disagree with the Ninth Circuit's decision. *Travelers Ins. Co. v. Cuomo*, 14 F.3d 708, 714 (2nd Cir. 1993), *rev'd on other grounds sub nom. New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995); *Thiokol Corp. v. Dep't of Treasury*, 987 F.2d 376, 380-81 (6th Cir. 1993); *E-Systems, Inc. v. Pogue*, 929 F.2d 1100, 1102 (5th Cir. 1991), *cert. denied*, 502 U.S. 981, 112 S.Ct. 585, 116 L.Ed.2d 610 (1991).

For example, in *Thiokol Corp.*, fiduciaries of an ERISA plan brought an action in Federal district court seeking a declaration that a Michigan tax was pre-empted by ERISA. The Sixth Circuit held the Tax Injunction Act did not bar the action, because federal courts have exclusive jurisdiction over actions brought by ERISA fiduciaries based on ERISA pre-emption. The Court stated:

> "We find that plaintiffs' claims for injunctive and declaratory relief against defendants are brought under ERISA. Therefore, under *Franchise Tax Board*, the exclusive federal jurisdiction provision of ERISA, 29 U.S.C. § 1132 (e)(1), applies, and under these circumstances, the Michigan courts lack jurisdiction to decide these ERISA claims.

> [¶] Because the Michigan courts lack the jurisdiction to decide the plaintiffs' injunctive and declaratory ERISA claims, the plaintiffs are without a 'plain, speedy and efficient' remedy at state law. Thus, the District Court has jurisdiction over those challenges to Michigan's tax code under ERISA seeking injunctive and declaratory relief."

Thiokol Corp., 987 F.2d at 380-81.

In reviewing *Travelers Ins. Co. v. Cuomo*, 14 F.3d 708 (2nd Cir. 1993), the United States Supreme Court noted:

> "This District Court and the Court of Appeals both held that the injunctive remedy was not prohibited by the Tax Injunction Act, 28 USC § 1341 [28 USCS § 1341], which provides that federal district courts 'shall not enjoin, suspend or restrain the assessment . . . of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.' Although these courts considered the surcharges to be taxes, they found no 'plain speedy and efficient remedy' to exist in state court, since ERISA § 502(e), 29 USC § 1132(e)(1)(1988 ed, Supp V) [29 USCS § 1132 (e)(1)], divests state courts of jurisdiction over such claims. See 813 F. Supp., at 1000-1001; 14 F.3d 708, 713-714 (CA2 1994)."

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 652 n.4 (1995).

By its own admission, the Ninth Circuit's opinion is contrary to the decisions in other Circuits. The Ninth Circuit stated:

> "We decline to [follow the holdings of the Fifth and Sixth Circuits], for those cases rest on reasoning which is in conflict with the law of this Circuit."

See Appendix, page 7.

Petitioner does not contend that ERISA somehow creates a blanket exception to the Tax Injunction Act. Petitioner contends only that, because (1) California's property tax system is self-enforcing, so the only way to challenge an improper tax is by filing a suit for refund, (2) only an entity specified in ERISA has standing to sue under ERISA, and (3) federal courts have exclusive jurisdiction of suits brought by ERISA trustees, petitioner has no plain speedy or efficient remedy in state court. Accordingly, by its own terms, the Tax Injunction Act does not bar this case. It is on the specific issue of the existence of a remedy in state court in this type of case that the Ninth Circuit disagrees with the Second, Fifth and Sixth Circuits.

ERISA was specifically designed to bring national uniformity to laws regulating pension plans. ERISA preemption is " . . . deliberately expansive, and designed to establish pension plan regulation as exclusively a federal concern." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987) (citation omitted). The issue of the right of an ERISA trustee to bring this type of action in federal court is an issue where there is an overriding need for national uniformity. If the issue is not resolved by the Supreme Court, ERISA trustees will be able to sue in federal court to challenge taxes imposed by state and local governments in the Second, Fifth and Sixth Circuits, but ERISA fiduciaries in the Ninth Circuit

will not be able to exercise the same right, and ERISA fiduciaries in the remaining Circuits will be in limbo.

The issue here is also important because, unless the Ninth Circuit's decision is reversed, petitioner and other ERISA trustees will be without a remedy to assert their rights under ERISA. Many schemes of taxation (including California's property tax system) are self-enforcing, so that the only way for a taxpayer or other injured party to challenge the tax is to bring suit to seek a refund. *See, e.g.*, California Revenue and Taxation Code § 1607, 5096-5149.5. ERISA trustees will not be able to bring suit in federal courts, under the Ninth Circuit's interpretation of the Tax Injunction Act. As ERISA trustees, they will not be able to sue in state courts, because Congress has granted exclusive jurisdiction over such suits to the federal courts. As discussed below in section 2, no party other than an entity specifically mentioned in ERISA has standing to bring an action under ERISA. Accordingly, even if petitioner can cause, for example, One Market Plaza, the joint venture, to sue for a refund in state court, One Market Plaza does not have standing to bring a claim under ERISA.

Petitioner is not here asking for a ruling of ERISA pre-emption. It is only asking for a hearing on that issue in a court which has jurisidiction to hear the matter. Under the Ninth Circuit's ruling, petitioner has been denied that hearing.

2. The Ninth Circuit's Decision Is In Conflict With The Decisions Of The Second, Eighth And Eleventh Circuits, As Well As The Relevant Decisions Of The United States Supreme Court, On The Question Of The Right Of An Entity Not Specified In ERISA To Bring An Action Under ERISA

Secondly, the Ninth Circuit in this case held that petitioner, an ERISA trustee, could not bring this action in federal court under ERISA, because the Ninth Circuit believed that petitioner could cause another entity, One Market Plaza, not an entity specified in ERISA as having the right to sue under ERISA, to bring a claim under ERISA in state court. Thus, the second question presented is: Can an entity which is not an ERISA beneficiary, participant or fiduciary bring an action under ERISA in state court?

On this question, the Ninth Circuit's decision is in direct conflict with decisions of the Courts of Appeal for the Second, Eighth and Eleventh Circuits. *Chemung Canal Trust Co. v. Sovran Bank/Maryland*, 939 F.2d 12, 14-15 (2nd Cir. 1991); *McKinnon v. Blue Cross and Blue Shield of Alabama*, 935 F.2d 1187, 1193 (11th Cir. 1991); *Blackmar v. Lichtenstein*, 603 F.2d 1306, 1310 (8th Cir. 1979).

For example, in *Chemung Canal*, the Second Circuit held that a former trustee of an ERISA trust does not have standing to bring an action under ERISA, because former, as opposed to current, trustees are not explicitly given the right to sue by ERISA itself. Similarly, in *Blackmar*, a trustee of an ERISA-regulated trust filed an action against former trustees for breach of fiduciary duty. He was then terminated as trustee in apparent retaliation for his asserting a similar claim against the sponsor of the ERISA

plan in question. The Eighth Circuit upheld the dismissal of his complaint on the ground that, once he was terminated as trustee, he had no standing to continue to assert claims under ERISA. The Eighth Circuit stated:

> "Sections 501 and 502 of ERISA contain its penalties and enforcement procedures. Section 502 also identifies who may bring a suit if any of the provisions are breached. Those who may bring a civil action according to the Act are (1) a participant or beneficiary, (2) the Secretary of Labor, or (3) a fiduciary. 29 U.S.C. § 1132.
>
> Once Blackmar's successor trustees, Knox and Best, were appointed, he ceased to be a fiduciary and no longer had the capacity to sue for violations which may have occurred under this title."

Blackmar, 603 F.2d at 1310.

In *McKinnon*, the Eleventh Circuit held that, although a family member of an ERISA beneficiary or participant had the right to bring an ERISA claim as a representative of the beneficiary or participant, she could not bring claims under ERISA in her personal capacity.

Certiorari should also be granted on this issue under this Court's Rule 10(c) because the Ninth Circuit has decided the important federal question in a way that conflicts with the relevant decisions of the Supreme Court.

The Supreme Court has held that parties not specified in ERISA do not have standing to assert a cause of action under ERISA. *Massachusetts Mutual v. Russell*, 473 U.S. 134, 146 (1984) ("The six carefully integrated civil enforcement provisions found in [11 U.S.C. § 1132(a)] as

finally enacted . . . provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly."); *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 27 (1983) ("ERISA carefully enumerates the parties entitled to seek relief under [11 U.S.C. § 1132(a)]; *it does not provide anyone other than participants, beneficiaries, or fiduciaries with an express cause of action for a declaratory judgment on the issues in this case.*") (Emphasis added).

By contrast, the Ninth Circuit has held that One Market Plaza, a joint venture, can bring this action under ERISA in California state courts.

3. The Supreme Court Has Previously Noted The Issue Raised By This Petition

This Court has twice noted, but never directly decided, the first issue presented by this petition.

In *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 20 n.21 (1983), this Court noted:

> "We express no opinion, however, whether a party in CLVT's position could sue under ERISA to enjoin or to declare invalid a state tax levy, despite the Tax Injunction Act, 28 USC § 1341 [28 USCS § 1341]. See *California v. Grace Brethren Church*, 457 US 393, 73 L Ed 2d 93, 102 S. Ct 2498 (1982). To do so, it would have to show either that state law provided no 'speedy and efficient remedy' or that Congress intended § 502 of ERISA to be an exception to the Tax Injunction Act."

As mentioned above, more recently, in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995), in reviewing the Second Circuit's decision in *Travelers Ins. Co. v. Cuomo*, 14 F.3d 708, this Court noted that the Second Circuit has held that federal courts *do* have jurisdiction to hear actions brought by ERISA trustees challenging local taxes but stated: "Neither party challenges this conclusion and we have no occasion to examine it." 514 U.S. at 652 n.4.

Although the Court did not examine the jurisdictional issue in *New York State Conference*, it did go forward and resolve the substantive issues in that case.

Finally, Justice Scalia, in staying the Fifth Circuit's decision in *E-Systems, Inc. v. Pogue*, 929 F.2d 1100, 1102 (5th Cir. 1991), pending the decision on a petition for certiorari, noted the Fifth Circuit's position on the very issue raised by this petition and suggested that a writ of certiorari would probably issue in that case. *Barnes v. E-Systems, Inc.*, 501 U.S. 1301, 1302-3 (1991). However, the petition for certiorari in that case was ultimately denied. *Barnes v. E-Systems, Inc.*, 502 U.S. 981 (1991).

CONCLUSION

The Ninth Circuit's decision that petitioner had a plain, speedy and efficient remedy in state court for its claim under ERISA is directly contrary to the decisions of the Second, Fifth and Sixth Circuits and its decision that a third party can bring an action under ERISA in state court is contrary to the decisions of the Second, Eighth and Eleventh Circuits and to the decisions of the United

States Supreme Court. Uniformity in this area of the law is critical. Accordingly, this Petition should be granted.

Respectfully submitted,

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APPENDIX

The decision of the United States Court of Appeals for the Ninth Circuit as reported at 121 F.3d 557 (9th Cir. 1997) .....App. 1

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHASE MANHATTAN BANK, N.A., as Trustee of the IBM Retirement Plan Trust Fund, *Plaintiff-Appellant,* v. CITY & COUNTY OF SAN FRANCISCO; SAN FRANCISCO BOARD OF SUPERVISORS; ASSESSMENT APPEALS BOARD FOR THE CITY AND COUNTY OF SAN FRANCISCO; DORIS WARD, Tax Assessor for the City and County of San Francisco; THAD BROWN, Tax Assessor; BRUCE JAMISON, County Recorder, GREG DIAZ, Acting County Recorder for the City and County of San Francisco, *Defendants-Appellees.*	No. 95-16474 D.C. No. CV-95-00004-VRW OPINION

Appeal from the United States District Court
for the Northern District of California
Vaughn R. Walker, District Judge Presiding

Argued and Submitted
October 7, 1996 – San Francisco, California

Filed August 18, 1997

Before: Harlington Wood, Jr.,* Mary M. Schroeder, and Cynthia Holcomb Hall, Circuit Judges.

Per Curiam Opinion

SUMMARY

Labor and Employment/ERISA

The court of appeals affirmed a judgment of the district court. The court held that the district court lacks jurisdiction over an action by a pension plan trustee to declare that a city's upward reassessment of property transferred to the plan is barred by the Employee Retirement Income Security Act (ERISA).

The IBM Retirement Plan Trust Fund (plan) purchased an annuity contract. As part of the contract, the seller allocated a share if its interest in the One Market Plaza venture to the plan. Appellees city and county of San Francisco deemed the transfer a change in ownership under California law, which allowed them to reassess, upward, the property tax on the real estate.

As trusteee for the plan, appellant Chase Manhattan Bank filed a complaint in district court seeking a declaration that the creation of the separate account could not amount to a change of ownership for California tax purposes, because such a determination was preempted by ERISA, which preempts state laws that "relate to" ERISA plans.

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* Honorable Harlington Wood, Jr., Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

The district court dismissed for lack of subject-matter jurisdiction on account of the Tax Injunction Act (TIA). Chase appealed.

The TIA provides that district courts shall not enjoin, suspend, or restrain the assessment, levy, or collection of any tax under state law where a plain, speedy, and efficient remedy may be had in state court. Section 1132 of ERISA, however, gives federal district courts exclusive jurisdiction over actions by a plan's fiduciary to enforce the provisions of ERISA.

The Ninth Circuit has held that ERISA's grant of exclusive jurisdiction was not intended as an exception to the TIA. Fifth and Sixth Circuit cases concluding that the TIA does not preclude an action for a declaration of preemption in federal court rested on reasoning in conflict with the law of the Ninth Circuit. The Supreme Court's most recent pronouncement on the reach of the TIA has underscored the importance of the states administering their own tax law without federal interference.

Although Chase was not the taxpayer, the TIA bars a suit by a party that directs and controls an entity that can bring a state challenge, even if the party could not do so itself. Chase would appear to have control for purposes of challenging tax assessments affecting its interest in the One Market Plaza venture.

Although under § 1132, Chase might be able to bring an action in federal court to enjoin actions violating ERISA, the issue in this case was different: Could the One Market Plaza venture raise the preemption issue in state court?

Section 1132 requires only that actions under ERISA by specific entities – such as fiduciaries – be brought in federal court. It says nothing about actions by other entities such as the One Market Plaza venture. The Ninth Circuit has found that a plain, speedy, and efficient remedy exists when a party can pursue its ERISA preemption claim in state court.

Because Chase did not show that it lacks a plain, speedy, and efficient remedy under state law, the district court properly dismissed the suit as barred by the TIA.

COUNSEL

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Wayne Lewis Lesser, San Francisco, California, for the Amicus Curiae.

OPINION

PER CURIAM:

The issue is whether the Tax Injunction Act, 28 U.S.C. § 1341 ("TIA"), bars this suit for a judgment declaring that an upward reassessment of value for San Francisco real-estate tax purposes is preempted by the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 ("ERISA"), where the reassessment adversely affects an ERISA plan. The district court held the TIA bars the action, and we affirm.

In 1986, the IBM Retirement Plan Trust Fund ("Plan") purchased an annuity contract from Equitable Life Assurance Society of America ("Equitable"). As part of the contract, Equitable allocated a share of its interest in One Market Plaza Corporation into a separate account for the benefit of the Plan. Defendants City and County of San Francisco deemed this transfer a change in ownership under California law. *See* Cal. Rev. & Tax. Code §§ 60-69.3. This determination allowed them to reassess, upward, the property tax on One Market Plaza.

As trustee of the Plan, Chase Manhattan Bank ("Chase"), filed a complaint in district court seeking a declaratory judgment stating that the creation of the separate account could not amount to a change of ownership for California tax purposes, because such a determination was preempted by ERISA. *See* 29 U.S.C. § 1144(a), which preempts state laws that "relate to" ERISA plans. Defendants filed a motion to dismiss for lack of subject-matter jurisdiction on account of the TIA. The district court agreed with the defendants and Chase appeals.

This court reviews de novo the district court's conclusion that it lacks subject-matter jurisdiction. *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 396 (9th Cir.1996); *Cripps v. Life Ins. Co. of N. Am.*, 980 F.2d 1261, 1264 (9th Cir.1992).

The TIA provides that "district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. ERISA, however, gives federal district courts "exclusive jurisdiction" over actions by a plan's fiduciary to enforce the provisions of ERISA. *See* 29

U.S.C. §§ 1132(a)(3)(B)(ii) and 1132(e). Chase contends that ERISA's grant of exclusive jurisdiction to federal courts means that state courts have no jurisdiction to consider Chase's preemption arguments, thus depriving Chase of a "plain, speedy and efficient remedy" in state court.

The Supreme Court has twice reserved the question of the relationship between the TIA and ERISA's jurisdictional provision. *See New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S.Ct. 1671, 1675 n. 4 (1995); *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 20 n. 21 (1983). The Court stated that, to avoid the TIA, a party "would have to show either that state law provided no 'speedy and efficient remedy' or that Congress intended [29 U.S.C. § 1132] to be an exception to the [TIA]." *Id.*

This court, however, has concluded that ERISA's grant of exclusive jurisdiction was not intended as an exception to the TIA. *See Retirement Fund Trust v. Franchise Tax Bd.*, 909 F.2d 1266, 1272 (9th Cir.1990); *General Motors Corp. v. California State Bd. of Equalization*, 815 F.2d 1305, 1308 (9th Cir.1987); *Ashton v. Cory*, 780 F.2d 816, 822 (9th Cir.1986); *see also Darne v. Wisconsin*, 901 F.Supp. 1426, 1430 (E.D.Wis.1995) (adopting the reasoning of *Ashton* in absence of Seventh Circuit authority). The lead decision, *Ashton*, was written by Judge, now Justice, Kennedy and said:

> Nothing in the legislative history of ERISA suggests that in enacting federal law to protect individual pension rights and providing for exclusive federal jurisdiction over certain civil

> enforcement proceedings under ERISA, Congress sought to override the historic concern for state fiscal autonomy that underlies the [TIA]. . . . [W]e cannot infer from Congress' desire for uniformity [in federal law concerning pension plans] an intent to weaken the proscription of the [TIA] against actions in federal court to enjoin state tax levies.

Ashton, 780 F.2d at 821-22.

The Second, Fifth and Sixth Circuits have concluded ERISA's grant of exclusive jurisdiction does deprive parties of a remedy in state courts to consider ERISA preemption claims. *See Travelers Ins. Co. v. Cuomo*, 14 F.3d 708, 714 (2d Cir.1993), *rev'd on other grounds*, 115 S.Ct. 1671 (1995); *Thiokol Corp. v. Department of Treasury*, 987 F.2d 376, 380-81 (6th Cir.1993); *E-Systems, Inc. v. Pogue*, 929 F.2d 1100, 1102 (5th Cir.1991). Justice Scalia, acting as Circuit Justice and denying a motion to stay pending decision on a petition for certiorari in *E-Systems*, noted the conflict between the Fifth and Ninth Circuit's approach to the relationship between ERISA and the TIA. *See Barnes v. E-Systems, Inc.*, 501 U.S. 1301, 1302-03 (1991). Justice Scalia further noted the likelihood that the Fifth Circuit's approach would be reversed. *See id.* at 1303.

Chase nevertheless asks us to follow the holdings of the Fifth and Sixth Circuits in *Thiokol* and *E-Systems* to the extent that they concluded that the TIA did not preclude an action for a declaration of preemption in federal court. We decline to do so, for those cases rest on reasoning which is in conflict with the law of this circuit. Our disinclination to reach the conclusion Chase seeks is reinforced by the most recent pronouncement of the United

States Supreme Court on the reach of the TIA. *See Arkansas v. Farm Credit Servs.*, 117 S.Ct. 1776 (1997). The Court, in an unanimous opinion authored by Justice Kennedy, narrowly construed the TIA's exemption for actions instituted by the United States, stressing that the TIA is a " 'broad jurisdictional barrier.' " *Id.* at 1779 (quoting *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 470 (1976)). The Court in *Farm Credit* underscored the importance of the states administering their own tax law without federal interference:

> The federal balance is well served when the several States define and elaborate their own laws through their own courts and administrative processes and without undue interference from the federal judiciary. The States' interest in the integrity of their own processes is of particular moment respecting questions of state taxation.

Id. at 1780.

Chase also contends that it has no "plain, speedy, and efficient remedy" under state law because it is not the taxpayer. In *Franchise Tax Board of California v. Alcan Aluminum*, 493 U.S. 331, 339 (1990), the Court concluded that the TIA bars a suit by a party that directs and controls an entity that can bring a state challenge, even if the party could not do so itself. Because Chase is the trustee of the plan that owns the relevant interest in the One Market Plaza venture, Chase has a close relationship to the taxpayer. Thus, Chase would appear to have control for purposes of challenging tax assessments affecting that interest.

In *Alcan Aluminium*, the Court held that the TIA applied even though it was not entirely clear that the subsidiaries had standing in state court to raise the parent company's foreign commerce clause challenge. *See id.* at 340-41. It said that while its decision might have differed if California courts refused to allow the subsidiaries to make that argument, the parent company had not given any convincing reason to believe that would be the case. *See id.* Chase thus has the burden of showing that it could not raise preemption in state court. *See id.* at 340.

Chase has not provided a persuasive argument that the preemption issue cannot be raised in state court. It relies primarily on 29 U.S.C. § 1132(e), which grants district courts exclusive jurisdiction of civil actions under ERISA brought by a participant, beneficiary or fiduciary. This provision may well mean that only Chase can bring an action in federal court to enjoin practices violating ERISA. But the issue here is somewhat different: can the One Market Plaza venture raise the preemption issue in state court? In arguing that it cannot, Chase has in effect interpreted the statute to mean that only an ERISA participant, beneficiary or fiduciary may bring a claim of ERISA preemption, and then only in federal court.

The statutory language does not support this interpretation. Section 1132(e) requires only that actions under ERISA by specific entities – such as fiduciaries – be brought in federal court. It says nothing about actions by other entities such as the One Market Plaza venture. *Cripps*, 980 F.2d at 1264-65 and *Harris v. Provident Life and Accident Ins. Co.*, 26 F.3d 930, 934 (9th Cir.1994), upon which Chase relies, are not to the contrary. These cases hold that only those parties mentioned in § 1132 have an

express cause of action in federal court. They do not discuss what ERISA-related actions other parties may have in state court.

In *Ashton*, this court found that a plain, speedy and efficient remedy existed because a party could pursue its ERISA preemption claim in state court. *See Ashton*, 780 F.2d at 819-20. Chase attempts to distinguish *Ashton* by noting that federal preemption would have been raised defensively in the related state court proceeding, whereas in this case the venture would be asserting preemption offensively in its attempt to obtain a refund. But nothing in *Ashton* suggests the holding should be so limited. In fact, the case suggests that it does not matter whether the remedy is offensive or defensive. *See id.* at 820. The Supreme Court has taken a similar approach. In *Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 828-29 (1988), for example, it affirmed a decision by the Georgia Supreme Court that found ERISA preemption when it was asserted by a plaintiff in a state case.

We accordingly conclude that because Chase has not shown it lacks a plain, speedy and efficient remedy under state law, the district court properly dismissed this suit as barred by the TIA.

AFFIRMED.

ORIGINAL

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CHASE MANHATTAN BANK, N.A., as Trustee of the IBM RETIREMENT PLAN TRUST FUND, Plaintiff, v. THE CITY AND COUNTY OF SAN FRANCISCO, *et al.*, Defendants.	No. C-95-0004-VRW JUDGMENT (Filed Jun. 28, 1995)

On June 9, 1995, this action came on for hearing before the Court, Honorable Vaughn R. Walker, District Judge, presiding, and the issue having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that plaintiff take nothing, that the action be dismissed on the merits, and that the defendants City and County of San Francisco *et al.* recover of the plaintiff Chase Manhattan Bank, N.A. their costs of action.

Dated at San Francisco, California, this ___ day of June, 1995

/s/ Vaughn R. Walker
VAUGHN R. WALKER
United States District Judge

The undersigned approve this proposed judgment as to form, without waiving any objections to the ruling on the merits.

Date: June 19, 1995 /s/ Robert W. Fischer, Jr.
Robert W. Fischer, Jr.
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Date: June 12, 1995 /s/ Andrew Schwartz
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Attorney for Defendant
San Francisco
Assessment Appeals Board
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Date: June 12, 1995 /s/ Claude Kolm

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
NO. C-95-0004-VRW

I, PATRICIA VIAL, say:

I am a citizen of the United States, over eighteen years of age, an employee of the City and County of San Francisco and not a party to the within action; that my business address is Fox Plaza, 1390 Market Street, Sixth Floor, San Francisco, California 94102-5408.

That on this 6th day of July, 1995, I served

NOTICE OF ENTRY OF JUDGMENT

by placing a true copy thereof in an envelope addressed to:

John K. Van De Kamp
Robert W. Fischer, Jr.
Dewey Ballantine
333 South Hope Street, 30th Fl.
Los Angeles, CA 90071

Wayne L. Lesser, Esq.
Michael Mendelson, Esq.
1388 Sutter Street, Suite 810
San Francisco, CA 94109

Andrew Schwartz, Esq.
Deputy City Attorney
Fox Plaza
1390 Market St., 6th Fl.
San Francisco, CA 94102

and by then sealing and depositing said envelope, with postage thereon fully prepaid, in the United States Mail at San Francisco, California. That there is delivery service by the United States Mail at the place so addressed or regular communication by United States Mail between the place of mailing and the place so addressed.

I declare (or certify) under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

July 6, 1995
Date

/s/ Patricia Vial
PATRICIA VIAL

DECLARATION OF SERVICE BY MAIL

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHASE MANHATTAN BANK, N.A., as Trustee of the IBM Retirement Plan Trust Fund, Plaintiff-Appellant, v. CITY & COUNTY OF SAN FRANCISCO; SAN FRANCISCO BOARD OF SUPERVISORS; ASSESSMENT APPEALS BOARD FOR THE CITY AND COUNTY OF SAN FRANCISCO; DORIS WARD, Tax Assessor for the City and County of San Francisco; THAD BROWN, Tax Assessor; BRUCE JAMISON, County Recorder, GREG DIAZ, Acting County Recorder for the City and County of San Francisco, Defendants-Appellees.	No. 95-16474 D.C. No. CV-95-00004-VRW (Northern California) ORDER (Filed Oct. 2, 1997)

Before: WOOD,* SCHROEDER, and HALL, Circuit Judges.

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* Honorable Harlington Wood, Jr., Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE
VAUGHN R. WALKER, JUDGE

CHASE MANHATTAN BANK, N.A.
Plaintiff,
vs.
CITY AND COUNTY OF SAN FRANCISCO,
Defendants.

No. C-95-1597

Friday, June 9, 1995
San Francisco, California

REPORTER TRANSCRIPT OF PROCEEDINGS

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[p. 3] *Friday, June 9, 1995*

THE CLERK: Calling Civil 95-1597, Chase Manhattan Bank, N.A., versus the City and County of San Francisco, et al.

Counsel, your appearances for the record, please.

MR. FISCHER: Good afternoon Your Honor. I'm Robert Fischer of Dewey Ballantine. We represent the plaintiff, Chase Manhattan Bank, as trustee of the I.B.M. Retirement Fund.

MR. KOLM: Good afternoon Your Honor, Claude Kolm, Deputy City Attorney representing all the defendants except for the Assessment Court.

MR. MAHONEY: Afternoon, Your Honor. Pat Mahoney.

MR. SCHWARTZ: Andrew Schwartz appearing with Mr. Mahoney.

MR. LESSER: Wayne Lesser of the amicus brief.

THE COURT: Very well. Mr. Kolm, are you going to be arguing for the City?

MR. KOLM: Yes, Your Honor.

THE COURT: All right. And Mr. Fischer, you for the plaintiff?

MR. FISCHER: Yes, Your Honor.

THE COURT: All right. Well, who would like to lead off?

MR. FISCHER: Since I'm standing and Mr. Kolm is sitting, I'll start.

[p. 4] I presume that Your Honor would like me to address the questions that you raised in your telefaxed order of yesterday.

THE COURT: Yes.

MR. FISCHER: Well, I meant address those first.

THE COURT: That's fine. I may have one or two others, but proceed.

MR. FISCHER: In response to your two questions about who the taxpayer is and whether or not I.B.M. could in some way cause One Market Plaza, the joint venture, to pursue a claim for refund, there are two background facts which are in the record.

Two tax payments were made, one during the time the separate account was in existence in 1993, roughly 17 million dollars. That was made by the joint venture and I.B.M. was obligated to make a capital contribution to the joint venture.

The obligation is in the variable annuity contract which is Exhibit A to my declaration. These facts are undisputed facts. 18, 19 and 20, which are our proffered undisputed facts which are, in fact, undisputed as to these facts by the City.

The tax bill – I said tax bill, but I meant the notice of supplemental assessment – which was issued by the City, which is I think Exhibit D to my declaration, shows that Equitable, who held the separate account, was the person to whom [p. 5] the City was addressing the communications, for whatever light that sheds on who the taxpayer was.

The second payment occurred after the building had been sold to an unrelated third party. It was undisputed that the building was sold in 1994 to an unrelated third party.

THE COURT: So we're only talking about taxes that have been paid, not taxes into the future; is that correct?

MR. FISCHER: Well, at the time the motion was filed, not all the taxes had been paid. As of today the taxes have been paid except we didn't receive one more, if I could call it a clean-up notice, of a supplemental assessment as to one year which we still haven't received a tax bill yet.

There is an agreement by the parties that all those taxes paid in '93, paid in '94, and the ones to be paid, are the subject of this dispute, although the last little bit aren't due yet because we haven't been billed for it.

THE COURT: Well, does that mean that the amount of controversy is a liquidated amount, or will be as soon as this bookkeeping is done?

MR. FISCHER: I couldn't hear whether you said liquidated or unliquidated.

THE COURT: That what we're dealing with in the case as a whole is an action which would effect taxes that have previously been assessed, and were previously due and owing, and that have been paid. We're not dealing with taxes to be charged [p. 6] in the future?

MR. FISCHER: Well –

THE COURT: Is that what you're telling me?

MR. FISCHER: Let me answer –

THE COURT: Or maybe not.

MR. FISCHER: Let me try to answer the question this way, and if I'm wrong about your question, you of course can ask me another one.

With respect to ERISA, what we are entitled to ask for and what we have prayed for is an injunction against state laws which are preempted so that the relief requested is an injunction. That is the relief that ERISA gives Your Honor the power to give in a case where there's a claim of preemption.

So that injunction would cover the actions which led to the taxes which were paid and would enjoin the actions which might give rise to the one bill that's still coming in the future.

Did that answer the question you were really asking?

THE COURT: Not quite.

MR. FISCHER: I'm sorry.

THE COURT: You said the building was sold to a third party.

MR. FISCHER: Correct.

THE COURT: What was the date of that sale?

MR. FISCHER: November 20 something, 1994.

[p. 7] THE COURT: All right. And none of the claims that are being asserted by the plaintiff here effect taxes after that sale date; is that correct?

MR. FISCHER: They do not effect any taxes imposed for taxable years after that sale date, but some of the taxes imposed on Equitable during the time that Equitable held the account for the, in the separate account for I.B.M., were assessed and billed after that date. So –

THE COURT: Well, all right.

MR. FISCHER: So that's why I wasn't, I guess, quite understanding you. We are not arguing about any taxes into the future. The building will be reassessed presumably based on the sale to the third party, and that is for them to deal with.

And for what it's worth, it's not an ERISA entity.

THE COURT: All right. Well, does that change the nature of the claim which you're asserting from an equitable claim to a claim for damages?

MR. FISCHER: No. My claim is to enjoin acts which are preempted by ERISA, which is permitted by 1132, 29 USC 1132.

THE COURT: Okay.

MR. FISCHER: If I could address what I think may be the purport of the two questions that you asked yesterday in the way that is relevant to these cross motions.

As Your Honor probably understands, we have stipulated to try and resolve this ERISA issue first and not the [p. 8] other claims that we have and may pursue in this forum, or perhaps not.

The relevance of who is the taxpayer as to ERISA is that only an ERISA fiduciary, beneficiary or participant can pursue an action for a holding that certain state laws are preempted.

I brought with me, if it's useful to Your Honor or your staff, two Ninth Circuit cases, copies of two Ninth Circuit cases. I can give you the copies or give you the sites.

The case is *Cripps versus Life Insurance Company of North America* which is 980 F2nd 1261, and *Harris versus Providence Life and Accident Insurance Company*, which is 9 – no, it's not, I'm sorry, 26 F3rd, 930, both of which hold that where ERISA says that a trustee or a fiduciary, which is what my client is, or a beneficiary or a participant can seek, bring an action to seek to enjoin something which is preempted by ERISA. Only these entities can bring such an action.

So in a way, the second question which Your Honor asked is could we force the joint venture to pursue a state claim? I don't believe there is anything in the record about that, but for purposes of discussion, let's assume that we could force the joint venture. The joint venture, not being a fiduciary beneficiary or participant under ERISA, could not pursue this ERISA claim.

THE COURT: That's not why I was asking the [p. 9] question.

MR. FISCHER: Then I didn't understand the purport of your question.

THE COURT: Well, you're telling me that the joint venture could be compelled to seek a refund because of the, essentially, controlling position occupied by your client.

MR. FISCHER: I'm not in a position to state that to you unequivocally, Your Honor. I'm in a position to assume that. I didn't get your order last night to find out from the people in the Eastern time zone what the answer to that question is. For all I know, the joint venture doesn't exist because the property was sold. That is not in the record before Your Honor, but that is my view.

Understanding the question the way I thought I understood, I'm prepare [sic] to assume for the purpose of discussion that we could cause the joint venture to do whatever we needed to do.

But it can't pursue this ERISA remedy. It can't pursue it because it doesn't have standing to pursue it, and the state court doesn't have jurisdiction.

My problem there, Your Honor, which is the problem I faced when I filed this action, is I could litigate this question in the Assessment Appeals Board, a claim for refund, or with the state court and win and have an empty piece of paper issued by somebody who did not have jurisdiction to rule on it.

[p. 10] And there are two Ninth Circuit cases on that point, both of which are sited [sic] in our briefs, *General Motors versus Franchise Tax Board*, and *Retirement Plan Trust Fund versus Franchise Tax Board*. They're both Ninth Circuit cases and they both cover that very point.

If an ERISA entity can only bring its ERISA claims in the federal court, that's the only court with jurisdiction.

And the two cases I just gave Your Honor, *Cripps* and *Harris*, say only the ERISA entity can bring those ERISA claims.

THE COURT: What would prevent the joint venture from pursuing an action in its own name in state court?

MR. FISCHER: Pursuing an action for a change in the assessment?

THE COURT: Yes, and/or a refund.

MR. FISCHER: It could do that if it's on the grounds that the assessment is too high. We think that the assessment that was ultimately issued in this case is ridiculous and the joint venture could go to the Assessment Appeals Board, has gone to the Assessment Appeals Board, which has agreed to hold it while we try to resolve this question.

They could do that, and if they're unsuccessful in the Appeals Board and if they want to take up the state law question of whether this was a change in ownership, about the beneficial ownership change, the joint venture could do that.

But what they couldn't do is bring this action, [p. 11] this claim, that's brought us here today.

THE COURT: Well, what would be the effect on this action if the joint venture were to pursue the remedy which you have just described?

MR. FISCHER: I thought that might be one of the questions that was on Your Honor's mind. Both the *General Motors* case – the effect, to answer your question specifically, I suppose is that if the joint venture prevailed on every grounds, there was no change of ownership or the value was too high or it wasn't right, that would render this issue moot as far as this action is concerned.

My response, however, to again what I assumed to be the purport of Your Honor's question, is both *General Motors*, which I just referred you to, and *Retirement Plan Trust Fund* hold that it is not appropriate for a Federal District Court, faced with an ERISA claim by an entity with ERISA standing, to abstain from ruling on it pending resolution of related state court proceedings.

And incidentally, *General Motors* also holds that the fact that somebody else has a remedy in the state court proceeding did not provide a remedy to the ERISA entity, and it sites [sic] a case which is another Ninth Circuit case for that proposition.

So it could be that this case could be won in part in some court of a state remedy, but as an ERISA entity, my [p. 12] client has a right to bring this claim, and it can only bring it in this court. It alone can bring it, and only in this court. And I believe it's entitled to a resolution of that.

THE COURT: Tell me the names of those cases that you referred to a moment ago. *General Motors* was one.

MR. FISCHER: Sure.

THE COURT: Was that *General Motors versus California State Board of Equalization?*

MR. FISCHER: Yes, it is. You got that.

THE COURT: What was the other one?

MR. FISCHER: *Retirement Fund Trust of Plumbing.*

THE COURT: *Trust of Plumbing?*

MR. FISCHER: How did I know that would be a question? *Retirement Fund Trust of Plumbing versus Franchise Tax Board,* which is 909 F2nd, 1266.

And I can give you the point that I just made, which is that another person, another person's remedy is irrelevant for these purposes on page 1308 of the *General Motors* case, and the point that the federal court should go forward and resolve the matter and not abstain is on pages 1308 and 1309 based in part of the federal court has exclusive jurisdiction of the ERISA.

The abstention discussion, the delay discussion in *Retirement Fund Trust of Plumbing* is on page 1274. *Retirement Fund Trust of Plumbing* is the case that we cited to Your Honor [p. 13] to deal with the *Ashton* case which is cited by the defendants for the proposition that you can raise ERISA defensively in a state court proceeding.

Retirement Plan Trust of Plumbing holds that that is irrelevant unless there is a pending, immediately pending, state court action in which that can be done, which there is not in this case.

THE COURT: Well, how do you reconcile, if you do, *Retirement Fund Trust of Plumbing* with *Cory versus Ashton*?

MR. FISCHER: In *Ashton* there was an existing pending state court proceeding, an effort in the state court to attach or levy on or collect money held by the plan.

THE COURT: Well, isn't that true here?

MR. FISCHER: No. There's no pending state court action. We have paid –

THE COURT: Well, there's a –

MR. FISCHER: – all these taxes.

THE COURT: I'm sorry. Not a state court action, but there is a state refund action that is presently pending before – you'll have to help me with the name of the entity, of the government entity.

MR. FISCHER: I'll tell you what's happening.

THE COURT: The Assessment Board?

MR. SCHWARTZ: Assessment Appeals Board.

MR. FISCHER: We have filed administrative [p. 14] proceedings before the Assessment Appeals Board, and if we lose, and only.if we lose, we're entitled to file a state court action.

THE COURT: And I assume proceeding before the Assessment Appeals Board is a prerequisite to proceeding for any judicial relief.

MR. FISCHER: Correct.

THE COURT: Okay.

MR. FISCHER: But the way that this is covered in our brief, and I don't think there's any dispute about it, the way that the taxes work is that we, or some other entity of ours, would have to pursue, file that state refund claim. We would have to be the plaintiff in that state refund claim. And –

THE COURT: Why couldn't the joint venture pursue that claim?

MR. FISCHER: It could pursue the claim to the extent of valuation; it could pursue it to whether there was a state law change of ownership. But it can't pursue the ERISA claim, which is what brings us here today. It does not have standing to do it.

That's what the *Cripps* case talks about, and the *Harris* case. Actually, there was a time when the Ninth Circuit held differently and the Supreme Court held differently. It couldn't bring this motion. That's why I brought to Your [p. 15] Honor's attention the fact that *General Motors* and *Retirement Plan Trust of Plumbing* both

say that it is inappropriate to abstain pending state court proceeding.

In one case there was an existing state court proceeding of some kind, which would have resolved some or all of the substantive issues. These cases have to do with minimum wages for apprentices in certain industries.

THE COURT: How does *Franchise Tax Board versus Construction Laborers* fit into that? In that case, as I understand it, the Supreme Court held that the state court could determine whether or not the issues there in controversy were preempted by ERISA. Isn't that correct?

MR. FISCHER: I can't say whether that's correct or not based on that description of that case. I don't remember it by that name.

THE COURT: All right. Well, let's see if we can find it here. Do you have the case Mr. Fischer?

MR. FISCHER: I'm sorry.

THE COURT: I have got a copy.

MR. FISCHER: I'm sorry, Your Honor. When I went to look at it, I couldn't find it on that name.

THE COURT: 463 US at page 1.

MR. FISCHER: Excuse me, Your Honor. Would you mind repeating the name of the case?

THE COURT: *Franchise Tax Board versus Construction* [p. 16] *Laborers Vacation Trust* for Southern California. You cited it on page four of your reply brief, so you probably have it.

MR. FISCHER: I have it, Your Honor. I'm sorry. I didn't remember it by that name.

THE COURT: All right.

MR. FISCHER: In that case, Your Honor, it's at page 428, in June of 1990 the Franchise Tax Board filed a complaint in the state court. That's consistent with *Ashton versus Cory* in the sense that if there is a pending state action, then ERISA issues can be raised defensively by an ERISA entity.

THE COURT: Why should I draw a distinction between a pending state judicial action and a pending state administrative action, which is simply a prelude to judicial relief in the event that the petitioner or plaintiff doesn't get the administrative action, the relief, that it's seeking?

MR. FISCHER: Let me walk through that.

THE COURT: I wish you would.

MR. FISCHER: Okay. The pending administrative proceeding, the appellate is my side of the table. It's the joint venture which still exists at the time we filed those appeals. The joint venture cannot bring an ERISA claim. It doesn't have standing under ERISA to bring an ERISA claim. It can't argue ERISA in that case –

THE COURT: But it could certainly argue that the matter is preempted by ERISA.

[p. 17] MR. FISCHER: No.

THE COURT: And that your client ought therefore to be in a position to bring an action in federal court.

MR. FISCHER: I'm sorry. The first part of what Your Honor said is not the law.

The joint venture cannot bring a claim to the effect that certain actions of the State Board are preempted by ERISA. Only an ERISA fiduciary can bring that claim. And then ERISA says the federal courts have exclusive jurisdiction over actions brought by an ERISA entity to enjoin violation of its provisions, which [sic] what I'm doing here, it's exclusive jurisdiction.

That's what I meant before, Your Honor, when I said if the joint venture were to go to the Assessment Appeals Board and argue that and win, it would be a piece of paper without any substance behind it, because exclusive jurisdiction is here in this court to handle that claim of preemption.

THE COURT: Wouldn't it –

MR. FISCHER: Now –

THE COURT: Wouldn't the determination preclude the City and County from arguing to the contrary?

MR. FISCHER: I don't believe so. I don't believe a piece of paper issued by an entity without jurisdiction to issue it precludes anybody from taking the position. That's what I'm concerned about.

[p. 18] And the difference between this *Vacation Laborers Trust* case and our case is how the taxes get collected. In that case there is a civil action to collect the taxes, in this case it's from the trust, and ERISA can be raised defensively.

In this case, the way the system works is we have to pay all the taxes and then pursue the administrative remedy and then file our own case.

ERISA says that the exclusive jurisdiction for a claim brought to enjoin, or to find ERISA preemption, is in the federal courts. And that is confirmed by this *Retirement Trust Fund* case. It says absent an action such as listed here in *Franchise Tax Board* or in the *Ashton versus Cory* case, absent such an action, A) there's exclusive jurisdiction to entertain the claim of ERISA in the federal courts; and B) the federal court should go ahead and resolve it. That's the distinction.

The language of ERISA talks about a claim brought by a fiduciary so it matters who the plaintiff is. That's the way it works, and that's what these Ninth Circuit cases say.

THE COURT: I trust ERISA claims are not the Holy Grail and some principals [sic] of practicality have to apply here. What I'm having difficulty understanding is why a state court, or even a state administrative body, could not entertain a claim that its assertion of authority in a particular situation is foreclosed to it by the principals [sic] of the ERISA law.

MR. FISCHER: Because ERISA 29 USC 1132 (e) says,

> [p. 19] "The District Courts of the United States shall have exclusive jurisdiction of civil, under this subchapter brought by . . . a fiduciary," a number of people.

THE COURT: Well, we have exclusive jurisdiction of a number of matters, patents and copyrights, and if someone attempts to assert such a claim in the state court, the state court is perfectly within its prerogative in dismissing the action on the grounds that it is not properly within state court jurisdiction.

MR. FISCHER: Right. And the other thing that could happen is the state court could go ahead and resolve the matter, but you have nothing. You have an empty piece of paper issued by somebody who doesn't have jurisdiction to issue it.

That's why we had to come to bring this part of this case, at least, in this court. And that is clearly the holding of *General Motors* and *Retirement Fund Trust of Plumbing.*

THE COURT: All right. Now, is your claim ripe?

MR. FISCHER: Yes.

THE COURT: Well, the join [sic] venture has yet to exhaust its administrative proceedings, and whatever follows on judicial proceedings exist thereafter. Can you have a ripe claim on behalf of the trust until such time as the joint venture has exhausted these remedies?

MR. FISCHER: Yes, because the actions which I am [p. 20] seeking to enjoin, and the grounds that they're preempted by ERISA, have occurred. They are the determination by the assessor that there was a change of ownership, which was made some years ago now; the determination that was made as to the final value, which was made in late 1994; and the imposition of the fraud

claim occurred in late 1994, and all of which has been paid.

That is again why before I invited Your Honor's attention to those two portions of *Retirement Fund Trust of Plumbing* and *General Motors,* which deal with the requests in that case that the federal court abstain from-ruling on the ERISA issue pending resolution of state court proceedings, in both of which cases, in both of those cases the Ninth Circuit held that that was not an appropriate thing to do, that the issue was ready for decision and the District Court should go ahead and make that decision.

THE COURT: All right.

MR. FISCHER: I wanted to, on the question of ERISA preemption, address an issue that, frankly I'm embarrassed to say, I don't feel as though we did an adequate job of stating this clearly in our briefs, and it's because I didn't really put this in the proper context until I started reviewing both sides' briefs in preparation for this hearing earlier this week.

What struck me, when I reviewed both sides' briefs, is that the briefs are passing in the night. They don't quite [p. 21] engage in an issue. The City says this is the property tax law, we apply it the same to everyone, which is what happened, it's the law of general application.

And we say, "But here you're applying it to an ERISA entity in a transaction that had to be approved by the Department of Labor, a transaction in which 85 percent of them in the country are ERISA trusts." It's a very unique situation, and we've cited a number of cases which hold

that ERISA can preempt specific applications of laws of general application depending on the specific factual circumstances.

The City does not site [sic] any cases to contradict that broad legal principal [sic], but we gave Your Honor a number of cases. Actually the best Ninth Circuit case is called *Hydrostorage* which is at 891 Fed 2nd 719.

It involved an administrative order by the Department of Labor or somebody that regulates wages, and that order, as applied to a particular tenancy construction company which had come to California to build a damn [sic] or some kind of waterwork, was held to be preempted by ERISA.

The fact that the district judge was not holding that the wage-an[sic]-hour law as applied to apprenticing meant workers, or whatever they are, is invalid. But as applied to this tenancy entity when it came to California, in that circumstance it was preempted by ERISA.

Ingersol-Rand, which is a federal court case, [p. 22] actually holds that a decision of the text as Supreme Court in a particular case is preempted by ERISA. I'm sort of amused by the fact that I think that a lot of judges don't understand that their decisions would be stricken by ERISA, but that's what they state.

THE COURT: Staggering thought, isn't it?

MR. FISCHER: I couldn't resist suggesting it to Your Honor.

THE COURT: Wearing the bloody shirt are you Mr. Fischer?

MR. FISCHER: I'm sorry? I didn't hear you.

THE COURT: Never mind.

MR. FISCHER: The case, though, that I wanted to bring to Your Honor's attention on that point, and on the ERISA point generally, is this case which we do site [sic], *General America Life Insurance Company versus* [*Castonquay*].

THE COURT: [*Castonquay*].

MR. FISCHER: I'm sorry.

THE COURT: I know the case.

MR. FISCHER: The City sites [sic] it as authoritative too. *Castonquay* is exactly like this case. There was a law of general application which was the law about the personal liability of a trustee for the debts of the trust, perfectly valid, enforceable law. And this insurance company wants it to be applied to an ERISA trust, and the trustees claim ERISA [p. 23] preemption, and Judge Kazinski, writing for the Ninth Circuit, is follow that line.

This is the law of general application and somebody could apply it. But here they want to apply it to an ERISA trust doing its ERISA business, providing benefits to its employees. He says this is no ordinary trust, it's an ERISA trust.

The question in [*Castonquay*] then is the same question that faces Your Honor on this motion. How do you decide, when a law of general application is applied to an ERISA entity, whether in those circumstances the law relates to ERISA. Relation to ERISA as you know, ad nauseam by now, is the thrust of whether or not something is preempted.

There's an amusing comment saying it's easier to say, "I know one when I see one," but we are obligated to come up with a general rule, and here is the general rule for deciding those kinds of cases. And the general rule which he propounds is that ERISA governs, or regulates, certain relations. It governs the relationship between the plan and the member, between the plan and the employer. That's the kind of ERISA regulations there are.

THE COURT: Do you think Congress intended to regulate the relationship between property owners and the cities and counties in which the property is located when it enacted the ERISA statute?

[p. 24] MR. FISCHER: No. But what Congress clearly did intend to do was to regulate the relationship between I.B.M., a pension trust like I.B.M., and an entity holding its assets like Equitable. That's a fiduciary relationship.

THE COURT: That's not the controversy here, is it?

MR. FISCHER: Yes, it is, and I'll tell you why. Judge Kazinski, in [*Castonquay*], goes on to say it doesn't matter whether there is direct regulation or indirect regulation. The only issue is whether the state law reaches a relationship that is already regulated by ERISA. That is at 1522. That's how you decide.

Now, let's just examine the relationship between I.B.M. and Equitable in this case. As is before Your Honor in the federal register documents which we gave you, by transferring property to its own account, to a separate account, and holding it so that the proceeds from it could

be paid to I.B.M. under the variable annuity contract, Equitable became an ERISA fiduciary.

That is why the Department of Labor had to examine this transaction. We had a squabble about what they had to do, but there isn't any dispute that they had to examine the transaction and hold it exempt is the self-dealing rule of ERISA.

Now, under the scheme as it exists, the Department of Labor and all the parties believed that that property, One [p. 25] Market Plaza, and the other properties in this account, still belonged to Equitable. That is the ERISA scheme that regulates that transaction.

The City wants to say, "No, it doesn't belong to Equitable anymore. It belongs to I.B.M., at whatever level the Department of Labor said. The value of that property is 290 million dollars. They regulated whether that transaction could even occur based on the value.

And it's more than ironic that if somebody had said to them, "Wait a minute. The expenses of that property in the next six or seven years are going to go up by thirty-six or -seven million dollars. Equitable, you can't charge I.B.M. that much for that piece of property because it's not worth it. It's the present value, 36 million dollars less than what you're paying for it."

THE COURT: I gather what you're arguing is that the nature of ERISA regulation here is like securities regulation, regulation which looks to the soundness of the investment, or certainly that's a permissible subject matter for regulation of an ERISA plan.

MR. FISCHER: Correct.

THE COURT: And therefore, there is a stronger case for a federal interest here than would exist where the scheme of regulation is, as in the securities law, one of disclosure.

MR. FISCHER: Well –

[p. 26] THE COURT: That the department was interested in the risk which the ERISA plan was undertaking, and this was an undisclosed risk, at least it was a risk which couldn't be remedied out. Well, it couldn't be remedied except by proceeding outside of the ERISA environment, the regulations and judicial panoply of remedies that are provided for ERISA, and for that reason, this is different and subject to a stronger preemption argument. Is that what you're saying?

MR. FISCHER: I think – I may try to be a little facetious, but I think I tried to say that too often in our briefs.

We said over and over again – we're talking about a very peculiar kind of transaction where placed into it is an asset that Equitable already owned, and had owned, for some period. So that that transaction, as Your Honor just suggested, the value of the property becomes an issue which is subject to ERISA regulation, because if ERISA were overcharging the plan by transferring it to the separate account, that asset which is held, the Department of Labor would have said, "No deal." And ironically, nothing would have happened and Mr. Kolm and I never would have met, not in this context.

THE COURT: But you kind of catch yourself coming and going in that argument, because that tends to

make stronger the argument that there was a change in ownership.

MR. FISCHER: Not under ERISA, Your Honor, because [p. 27] under ERISA, the insurance codes of California and New York, which regulate this transaction, are saved by the saver clause which says there no change of ownership.

Every state which allows a straight account transaction has a statute – there's 32 of them – that say the property placed by an insured in a separate account remains the property of the insured. And that law is saved by the savings clause, which saves, from ERISA preemption, laws regulating insurance. So in the ERISA rubric there aren't any questions.

As you said before, within the framework of ERISA, there isn't any question that this property is Equitable property and wasn't transferred to I.B.M., and what I'm saying is that since that's an ERISA issue, a determination by a local government to the contrary, "Oh no, it was, it did change from Equitable to I.B.M.," is preempted.

And Your Honor asks – it looks as though you have another question, so I'm going to stop.

THE COURT: Well, I always look that way, but go ahead.

MR. FISCHER: Your Honor asked a question about notice itself by way of analogy to the securities laws.

As a potentially prohibited transaction, all of the details of this transaction had to be disclosed in the Federal Register. Opportunity was given for people to

call up and/or write, I guess, and complain. It was in the Federal Register, [p. 28] the federal origin of public disclosure, the way to do it in the federal system. Now the City wants to impose something like that eight or nine million dollars in fraud penalties on us for not separately filing the right piece of paper with the City.

So there are three different ways, change of ownership, value and disclosure in this transaction, and the creation of the separate account, which are regulated by ERISA. The relationship between Equitable and I.B.M. is regulated by ERISA in those three different ways, and in every one of those ways, the City wants to take a contrary position, and that's why I contend these three actions which we have tagged are preempted by ERISA.

Why I think the argument is most strong is the fundamental of ERISA preemption is to avoid just that phenomenon described by the Supreme Court as a patchwork of regulation. I wrote some somewhat sarcastic things in my brief. "What if the City of Los Angeles has a different view?"

THE COURT: I'm glad I'm not the only lawyer who's done that.

MR. FISCHER: "What if the City of Los Angeles has a different view, or the state of Montana has a different view?" The point of ERISA preemption, when you're dealing with something within the subject matter of ERISA regulation, is to avoid that very kind of thing.

THE COURT: ERISA plans invest in all kinds of [p. 29] properties, and the laws affecting those properties'

investment interests are creatures of state law, so why is this really any different?

MR. FISCHER: Well, if an ERISA plan purchases a building, that transaction, subject to some very few possible exceptions, isn't touched on by ERISA.

THE COURT: I see. Simply because this is a separate account type transaction for the establishment of this variable annuity?

MR. FISCHER: That is the relatively unique nature of the separate account. It's undisputed here that 85 percent of the assets to the separate account are held by pension plans. The City agrees those facts are undisputed.

It's a very unique situation, and also unique in another sense, which is that this asset had been held by Equitable. If Equitable had gone out and purchased this building from Your Honor and placed it immediately in the separate account, it would have been reassessed. The taxes would be whatever they would be, and the fact that Equitable placed it in this account would be inconsequential.

But this transaction has this additional element, and that is why ERISA regulates it, because that transaction creates a fiduciary relationship, and once you have that, in the words of Judge Kazinski, you have a relationship regulated by ERISA and a regulation which is preempted.

[p. 30] We've sited [sic] two or three cases to Your Honor which say that taxation is state law, the act of taxation is state law for purposes what I call the regulation.

THE COURT: All right. Mr. Fischer, I'm sure you want to address the Annuity and Injunction Act, or the State Tax Injunction Act, so I'll give you an opportunity to do that.

MR. FISCHER: The point – many of the points I would make about the Tax Injunction Act I made in my discussion of *General Motors*. *General Motors* holds that since you can't bring an ERISA action in state court, you have no plain, speedy and efficient remedy in the state court, and therefore, the Tax Injunction Act, by its own terms, did not apply.

THE COURT: Well, how do you reconcile *General Motors* with *Cory versus Ashton*, or *Ashton versus Cory*?

MR. FISCHER: That one I recognize the name either way.

THE COURT: All right.

MR. FISCHER: The reconciliation depends on what – it seems mechanical, but it's what ERISA says. It depends on who brings the action. The federal courts have exclusive jurisdiction over actions brought by plaintiffs; that is, actions in which the plaintiff is an ERISA entity, and that's what this is.

And under the State Property Tax law, as distinguished from whatever law was at issue with the *Vacation* [p. 31] *Trust, Laborers Vacation Trust* case, the only way this can happen is if the ERISA entity brings the action. The only place I can bring it is in federal court, because the federal court has exclusive jurisdiction.

THE COURT: Now, Justice Kennedy was the author of both these positions, and I presume the *General*

Motors case was decided in '87, and *Ashton versus Cory* the year before.

MR. FISCHER: And *Retirement.*

THE COURT: I resist the temptation to suggest that Justice Kennedy might not have remembered one year, or one case to the next, but –

MR. FISCHER: It doesn't really matter, Your Honor, because *Retirement Fund Trust of Plumbing* was decided in 1990, and it makes the very reconciliation of *General Motors* and *Ashton versus Cory* which I just argued to Your Honor. It makes that reconciliation on page 1272.

MR. KOLM: I'm sorry. Which case did you refer to?

MR. FISCHER: *Retirement Fund Trust of Plumbing.* It's cited in both *Ashton* and *General Motors.*

THE COURT: All right. Let me ask you one more question, and that is, we're dealing here with a motion to dismiss for lack of subject matter jurisdiction. You have the burden to establish that jurisdiction exists. If I conclude that the jurisdictional issue depends upon your showing that no speedy or effective remedy exists in state court, in accordance [p. 32] with the language of the Tax Injunction Act, what have you shown in the record that would establish that your client could not cause the joint venture to pursue relief in the state court?

MR. FISCHER: I don't believe there is anything on the record on that issue one way or the other. I didn't really focus on it until about, I could tell you the minute, four-oh-something last night.

But what I believe I need to show with respect to jurisdiction is that my client is an ERISA fiduciary, which is undisputed, and what I'm seeking, the relief I'm seeking, which is an injunction to enjoin the violation of ERISA and then ERISA confers jurisdiction over that dispute, exclusive jurisdiction as I said before, is on this Court. That's the response. I represent an ERISA fiduciary seeking to enjoin a violation of ERISA, and I cited before Section 1132(e) of ERISA. I'm sorry. It's 1132(a)(3), and 1132(e). They create jurisdiction for that dispute. Those numbers are the 29 USC numbers.

THE COURT: All right. Very well. Thank you, Mr. Fischer, for your argument.

MR. FISCHER: Thank you, Your Honor.

THE COURT: Mr. Kolm?

MR. KOLM: Thank you, Your Honor.

Let me begin by just commenting on a few things that Mr. Fischer mentioned, and then I'll proceed to the questions that you asked us to address, and then I'll finish with whatever [p. 33] else I have to finish up.

I've not seen the *Cripps* nor *Harris* case that he brought to the Court's attention just this afternoon, but I believe that there probably is, those are probably situations where the ERISA entity did not have control over the entity that was trying to assert ERISA preemption.

If that's so, that's clearly different from what's going on here. If that's not so and you intend to draw a distinction on that, of course we would like a chance to respond to those cases after we have had a chance to look at them.

But I believe that the full thrust of *Franchise Tax Board versus Alcan Aluminum* is that the state right to tax is a very important right. Congress did not want to, did not want to bridge that except in cases where the taxpayer did not have a chance to challenge what the state was doing.

And where there was an effective means, even if it was not the taxpayer itself, but the taxpayer could, in essence, be before the state to challenge the tax, that would be sufficient to uphold this very, very important right of the state to tax and the federal government would not step in.

I believe also that that's what now Justice Kennedy was referring to in *Ashton versus Cory* when he spoke of the important principal [sic] of comity and not wanting to interfere in that case. There were ongoing proceedings and there the ERISA entity could raise its defenses.

[p. 34] We read *Ashton versus Cory* a little bit differently from I.B.M. in that the – let me back up once more.

In *Alcan,* we believe therefore the Supreme Court is saying that a taxpayer cannot voluntarily disable itself from its right to challenge the tax in the state court proceedings.

THE COURT: Is there anything here that suggests that the plaintiff did that?

MR. KOLM: Yes, I believe so. First of all, we've pointed out that they have a right to subrogate themselves for the One Market Plaza joint venture and proceed before the Assessment Appeals Board directly.

THE COURT: What do you base your claim of subrogation on?

MR. KOLM: Our claim of subrogation is based on *United States versus California,* the Supreme Court's decision, and then the very recent Ninth Circuit decision, *United States versus County of San Diego,* which involves a case where the United States had had to reimburse a property taxpayer, and the Ninth Circuit specifically says, in footnote seven to that case, that the United States, as a subrogee, could put itself in the position of the taxpayer before the Assessment Appeals Board, or could have. However, the statute of limitations had expired in that case.

Similarly, we say that if the I.B.M. Pension Trust wants to step in for One Market Plaza, it can do so. And again, [p. 35] the thrust, we believe, of *Alcan* is that they can raise the ERISA preemption claim in that proceeding.

I think also that if you look, for instance, at *E-Systems versus Pogue,* a Fifth Circuit case that I.B.M., or that Chase Manhattan sited [sic], that says that ERISA preemption is jurisdictional, and certainly, therefore, they can raise that, it would seem to me, in a State Assessment Appeals proceeding to say that there was no jurisdiction to assert the tax.

Again, I haven't seen these, the *Cripps* and *Harris* cases, but I believe there can be a distinction on these that they probably involved an independent third party asserting a claim that was not jurisdiction.

Also, ERISA section 502(e) states that a fiduciary has a right to bring a claim arising under ERISA in Federal District Court which will have exclusive jurisdiction.

I don't believe that this is a claim arising under ERISA. I believe that this is a defense to a tax, and therefore can be asserted in the state administrative and court system basically as a defensive measure, although it is with the taxpayer as the instigating party to challenge the assessment in the first place.

Going on to the *General American versus,* I believe it's [*Castonquay*].

THE COURT: [*Castonquay*].

MR. KOLM: [*Castonquay*], I'm sorry. The opinion of [p. 36] Judge Kazinski focuses on relationships, but they're relationships that all go to specific operations of the ERISA mechanism to remedies that are available under ERISA to operations of the ERISA system.

In that particular case, it was the consequences of the actions of trustees, and that was held to be within the exclusive purview of ERISA, and to reportings and communications between an employer and the beneficiaries, or perhaps between an employer and the state, about the actual operation of the plan itself and, of course, to the actual substantive benefits that are available under the plan.

What we have here is an entity that is not an ERISA entity. One Market Plaza is a limited partnership, and that entity owns property. The City and County of San Francisco has asserted taxes that are due on that property the same way that we assert taxes that are due on General

Motors when it owns property in San Francisco. And it may be that General Motors stock is, in part, owned by a separate account, an insurance company, and we certainly know it's, in part, owned by ERISA pension trust.

THE COURT: Well, this case is different though, isn't it, at least for perhaps one reason, and perhaps more than one reason, and that is because it is part of a, it arises out of one of these separate account transactions which is a peculiar ERISA type of transaction. So doesn't that make this [p. 37] case different from a situation where an ERISA entity simply goes out and invests in an asset that is subject to regulation by some local or state governmental board?

MR. KOLM: No, I don't believe it does, Your Honor. I believe that the fact that it arises out of, as you say, arises out of such a transaction doesn't make any difference. I don't believe it really does arise.

It is looked at it [sic] by the City, who is the beneficial owner, who bears the benefits and burdens of the ownership, who bears the risk of the ownership.

THE COURT: No question here that the bearer of those risks is the I.B.M. pension fund, is there?

MR. KOLM: We find no quarrel with that, Your Honor, and that's just from measuring what certain tax consequences are to the property.

But I don't see how that relates to the property. We are doing nothing to I.B.M. It is a tax on the property. It's an in rem tax, and the mere fact that there was a transfer from Equitable itself from its general account to an Equitable separate account, that doesn't seem to bring, within

the ERISA purview, to me, the in rem property tax. It's a property tax that is just a measure. Certain things happen in the property tax to fix its value which also a [sic] change of beneficial ownership.

Now, the fact that that happened between two ERISA [p. 38] entities should not, should not, have any consequence to how the state can decide to tax its property. And what's more, the way Mr. Fischer has constructed it, the state can't even decide how to rewrite its tax.

Mr. Fischer says that when passing an insurance law that was meant only to govern the relationships between the separate account holder and the insurance company, that that [sic] all of a sudden is telling the state how it has to tax in rem property within its own, within its own, barriers.

I think that goes far beyond what Congress ever imagined.

THE COURT: Isn't that case different because now the property has been sold to a third party and so the economic consequences of this taxation are going to be imposed upon the ERISA creature, the pension plan, and doesn't that make all the more forceful the argument in favor of ERISA preemption?

MR. KOLM: No, because we can have all sorts of expenses that are imposed on ERISA entities.

The question is, is this posed upon an ERISA entity in carrying out its ERISA functions? We think, if an ERISA entity were to have a contract dispute with a provider of office supplies, that it's not, that it's not preempted by ERISA. In fact, that's the *McKey versus Linnear* case.

So the mere fact that there is an indirect expense posed upon an ERISA entity is not sufficient to be within the [p. 39] realm of ERISA. That's exactly what the Supreme Court's just said unanimously in the *Blue Cross* case.

So there has to be some interference with the ERISA entity carrying out its functions as an ERISA entity, and there was no interference with I.B.M. It is free to invest in whomever or whatever it wants. It is free to structure its transactions however it wants. There was nothing that in any way directly impinged upon I.B.M.'s pension trust freedom to do whatever it wanted.

THE COURT: You've essentially put all of your reliance, or most of your reliance, upon the Tax Injunction Act. Now, that act prohibits an injunction against a state tax on the grounds of unconstitutionality. Does it follow that the principals that underlying the Tax Injunction Act foreclose this Court's jurisdiction where the relief is based upon a claim of federal statutory preemption? Isn't a claim of unconstitutionality different from one in which the claim is being asserted by the taxpayer, that the subject of the regulation, tax regulation, is preempted by federal law?

MR. KOLM: Well, first of all Your Honor, I believe that we do get into unconstitutionality, because I think ultimately the reason that the state tax can be preempted, if it can, is because of the constitutional supremacy clause. And so the tax is unconstitutional because it is preempted and the preemption gets its power from the Federal Constitution.

[p. 40] But I don't believe that the Tax Injunction Act goes solely to the constitutionality of the tax. I think it goes – I think it would cover an ERISA case.

I believe that's exactly what the Court's have held where the claims have been raised. I believe, for instance in *Ashton versus Cory*, it's not a case of the constitutionality of the tax. It was a question of whether there was an ERISA preemption. And in *Ashton versus Cory*, the Ninth Circuit held that that can be raised in the federal, in the state form because there is a plain, speedy and efficient remedy.

We don't read that the fact that the proceedings were already underway as being the deciding factor in *Ashton*. We believe that the fact was that the proceedings were available, and in fact, I believe, and the way I read *Retirement Fund Trust of Plumbing versus Franchise Tax* indicates that on page 1272, it says, "Absent ongoing state action however, we've rejected the indirect procedures available to a trust as neither plain, speedy, nor efficient." That refers to *General Motors*.

That gets me back to the next point that I want to discuss in what Mr. Fischer raised. *General Motors* is a 1987 case. The cases that we're relying on for subrogation are 1990 U.S. Supreme Court decisions and the 1995 Ninth Circuit decision.

Furthermore, to the best of my knowledge, there was no claim of subrogation that was before, that was raised before, [p. 41] the court in the *General Motors* case. So that question wasn't considered. Essentially the Franchise Tax Board conceded it in the *General Motors* case.

I believe if that case were to go before the Court today and the subrogation claim could be made, then the decision would come out otherwise.

As far as *Retirement Plan Trust Fund* holding that there was no preemption, that is a different case. There was no right of subrogation between the trust fund and the beneficiaries who were the parties that were having their wages withheld, so therefore the beneficiaries truly were the only party that had the standing to raise their rights, and they were clearly very separate from the trust fund.

General Motors was not that type of situation. And again, I believe that under the precedent of the *United States versus California* and *United States versus County of San Diego*, the *General Motors* case, were the subrogation matter brought before the Court, would come out differently today.

Now, going to the Tax Injunction Act, as I said, the *Alcan* case says that where there is control over the taxpayer, then the Tax Injunction Act, then the taxpayer has a plain, speedy and efficient remedy and the Tax Injunction Act will apply.

One Market Plaza has failed to allege that it has no control over the taxpayer, and therefore it has failed on the [p. 42] face of its pleadings to allege all facts necessary to allege the jurisdiction.

As far as whether there is a plain, speedy and efficient remedy, again, they can go in as subrogees and challenge it. We believe that they have the right to raise the ERISA preemption in front of the Assessment

Appeals Board, or they can direct the litigation, as case law also in the insurance area about insurance companies directing the litigation where they have rights of subrogation, and for various reasons don't want to appear on their own.

Moving beyond the Tax Injunction Act, we believe that that's our, that's our first line of defense, that the Court doesn't have jurisdiction.

However, we do believe also on the merits that this is not a case where it was ERISA preemption applies. In order for ERISA preemption to apply, there has to be a relationship between the law at issue and the ERISA plan.

The Supreme Court has held that a mere indirect economic effect is not enough for that relationship to exist. That's the *Blue Cross* case on which plaintiff's had placed the bulk of their claim until it was reversed by the Supreme Court.

They give, however, three other reasons why they say if there's no ERISA preemption, they say no special treatment for separate accounts. But again, this is not a separate account transaction that is in any way impinged upon by the [p. 43] state law. They're free to structure their separate accounts in any way they want.

In a separate account transaction, if the mere fact that a separate account transaction occurred and there was a separate account transaction, then maybe all separate accounts should be exempted from tax. But the fact that there was a transaction between a separate account and their general account of an insurance company is not what's being taxed. It is the property that's being taxed.

Thirdly, they say that there is a direct effect on the plan. We contest this vigorously. There is no direct effect on the plan. This is an indirect expense, exactly the same, or exactly analogous, to the case in *McKey versus Linnear Systems* where there could be indirect expenses of a garnishment on a plan, and that was held not to be preempted because that did not have anything to do with the plan functioning as an ERISA plan.

And finally, they said that there's this patchwork of state regulation. Well, if one accepts that, then any action taken by any official interpreting any law suddenly becomes preempted by ERISA. And of course, state laws are not self executing. They, in fact, come into play only by local officials enforcing them.

And so I.B.M.'s argument goes too far. It says that every act, to enforce a state law, is preempted by ERISA. And [p. 44] the consequence of that is that every state law is preempted by ERISA to the effect that, and to the extent that, it would impinge upon an ERISA pension plan, and that's clearly not the case.

The plaintiff has the chance to raise its argument that there was no change in ownership before the Assessment Appeals Board. It also has the chance to argue before the Assessment Appeals Board that there's no jurisdiction, or that the change in ownership is preempted by ERISA.

There's no reason for this Court to take –

THE COURT: Well, what's your argument to, or your answer to, Mr. Fischer's argument that because the state court, or the Assessment Appeals Board, is without

jurisdiction of ERISA, any determination that it makes with regards to the preemption issue is simply a nullity?

MR. KOLM: We don't accept that it's without jurisdiction under ERISA, and we think *Ashton versus Cory* indicates that it would have jurisdiction. We don't understand that there's any difference between the facts in *Ashton versus Cory* that there was a, that the state taxing entity was the defendant in that, or was the plaintiff in that case, and the fact that it would be the defendant in this case.

We think that *Ashton versus Cory* merely says that if there is a place where you can raise that claim in the state forum, then comity says that there will be no intervention by [p. 45] the federal courts.

To the extent, again, Mr. Fischer is claiming that *Cripps versus Life Insurance Company of North America* and *Harris versus Providence Life Insurance Company* say different.

And if this Court is inclined to rely on his argument for that, we would like the chance to further brief that, because we've not seen these cases.

THE COURT: All right. Thank you Mr. Kolm.

We have amicus in this case. You are Mr. Lesser is it?

MR. LESSER: Yes, Your Honor. I came here today not to argue on the merits, because I'm not prepared for the merits.

We concur with the City's position. In fact, I.B.M. has, at the Assessment Appeals level, raised ERISA in its defense. It just hasn't pursued it yet.

Other than that, I have to stand with the position of the City, the record, and our brief as submitted.

THE COURT: All right. Very well. Thank you very much Counsel. The matter is submitted.

Now, before the Court this afternoon are three motions. The defendants have filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), arguing that the Court lacks subject matter jurisdiction over this action.

In addition, we have the plaintiff's motion for summary judgment, and we have a cross-motion with respect, or a [p. 46] cross-motion by the City and County, and I overlooked to mention that the City and County has filed a motion under Federal Rule of Civil Procedure 12(b)(6).

The plaintiff in this action seeks declaratory and injunctive relief, challenging property tax assessment against One Market Plaza, a building located in the City and County of San Francisco.

Plaintiff challenges the tax on three grounds. First, plaintiff contends that the state tax system as applied to the plaintiff is preempted by ERISA, 29 USC, Section 1144.

Second, plaintiff contends that the tax assessments violate state law.

And third, plaintiff contends that the tax assessment violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Plaintiff is not specifically alleging that third cause of action as arising under 14 USC, Section 1983, but presumably, it is that statute which provides that such an action may be brought in this court, and on that issue I will speak further in a moment.

In cases where the jurisdiction of the court is challenged as a factual matter, the party invoking jurisdiction has the burden of proving the allegations of the jurisdictional facts by competent proof.

Now, the defendants contend that the Tax Injunction [p. 47] Act, at 28 USC, Section 1341, deprives the court of subject matter jurisdiction because this action challenges the assessment of a tax under state law. The Tax Injunction Act provides that the District Courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state.

The Supreme Court recently, in *Franchise Tax Board of California versus Alcan Aluminum*, 493 US 331, explained that the Tax Injunction Act has its root in equity practice, in principles of federalism, and in recognition of the imperative needs of a state to administer its own fiscal operations. This last consideration was a principal motivating factor behind the act. The legislation was first and foremost a vehicle to limit drastically Federal District Court jurisdiction to interfere with so important a local concern was the collection of taxes.

Although the Tax Injunction Act on its face bars only actions for injunctive relief, the Supreme Court in *Fair Assessment versus McNary*, 454 US 100, applied the act to bar damages actions under 42 USC Section 1983. Tax

payers are barred by the principle of comity from asserting Section 1983 actions against the validity of state tax action systems in the federal courts according to the Supreme Court.

Soon thereafter, in *California versus Grace Brethren Church* at 457 US 393, the Supreme Court extended the Tax [p. 48] Injunction Act to bar federal declaratory relief actions that challenge the constitutionality of a state tax system. The Court reasoned that the declaratory judgment procedure may in every practical sense operate to suspend the collection of the state taxes until the litigation has ended, and therefore, the same concerns of comity and federalism block federal jurisdiction.

Furthermore, the court noted that federal constitutional issues are likely to turn on issues of state regulatory law and are more properly heard in the state courts.

Under these cases, the Tax Injunction Act governs plaintiff's second cause of action based upon state regulatory law, and plaintiff's third cause of action based upon the Equal Protection Clause to the Fourteenth Amendment.

Whether the Tax Injunction Act governs plaintiff's first cause of action for ERISA preemption remains for the Court's consideration.

Now, to determine that question, the Court must determine whether the Tax Injunction Act bars federal jurisdiction over a declaratory judgment action based upon ERISA preemption.

In the *Fair Assessment* and *Grace Brethren Church* cases, the Supreme Court applied the Tax Injunction Act

to bar damages and declaratory relief actions based on federal constitutional challenges to state tax assessments. These cases [p. 49] did not address whether the Tax Injunction Act would similarly bar a challenge to a state tax based upon a preemptive federal tax statute.

The holding of *Grace Brethren Church* was based in part on the Supreme Court's concern that a federal court must decide issues of state regulatory law when resolving a constitutional attack on a state tax assessment. For a federal statute such as ERISA, that concern is absent.

In contrast to the limited federal interference in matters of state taxation, federal courts have exclusive jurisdiction over actions under the ERISA statute. In *Franchise Tax Board of California versus Construction Laborers Vacation Trust* at 463 US 1, the Supreme Court expressly reserved the issue whether the Tax Injunction Act bars challenges to state tax laws under ERISA in federal court.

Some circuits have held the ERISA statute to govern, requiring these cases to be brought in federal court. These cases included *Travelers Insurance Company versus Cuomo* at 14 F3rd, 708, a 1993 Second Circuit decision which was subsequently reversed on other grounds; *E-Systems Incorporated versus Pogue*, a 1991 Fifth Circuit decision at 929 F2d 100; and *Thiokol Corporation versus Department of Treasury* at 987, F2d 376, a 1993 Sixth Circuit decision.

Now, the guidance which the courts find from the Ninth Circuit appears in a 1986 decision, *Ashton versus Cory*, a [p. 50] decision written by Judge, now Justice, Kennedy. In that case, the Ninth Circuit concluded that the Tax Injunction Act governs declaratory challenges to state tax schemes based upon ERISA preemption. The

Court stated the Supreme Court has repeatedly stated that the principal purpose of the Tax Injunction Act was to curtail federal court interference with state revenue collection procedures.

Nothing in the legislative history of ERISA suggests in enacting federal law to protect individual pension rights and providing for exclusive federal jurisdiction over certain civil enforcement proceedings under ERISA, Congress sought to override the historic concern for state fiscal autonomy that underlies the state, excuse me, that underlies the Tax Injunction Act.

The Ninth Circuit having addressed this question, the Court concluded that the Tax Injunction Act governs plaintiff's first cause of action, as well as the other two.

Now, having concluded that the Tax Injunction Act applies to the case at bar, the Court must address whether the Act, on its terms, forecloses federal jurisdiction. Under the Act, jurisdiction is barred unless plaintiff does not have a plain, speedy and efficient remedy to challenge the tax in state court.

A state court remedy is plain, speedy and efficient if it provides the taxpayer with a full hearing and a judicial determination at which the taxpayer may raise any and all [p. 51] constitutional objections to the tax. Plaintiff bears the burden of proving that the state scheme is inadequate.

Now, the plaintiff here argues that it is incapable of challenging the imposition of the tax in state court. First plaintiff contends that it is not the taxpayer, therefore, it

may not bring an action in state court to enjoin the imposition of the tax.

Second, plaintiff claims that because federal courts have exclusive jurisdiction over ERISA claims, any state court judgment that the tax is preempted by ERISA would have no effect. Plaintiff argues that because it therefore has no plain, speedy and efficient remedy in state court, the Tax Injunction Act does not bar this action.

Now, in considering whether the plaintiff has standing to bring a state court action, the Court must look to California law. Under California law, a taxpayer may first bring an action for a refund before an administrative body. In this case the relevant body is the local Assessment Appeals Board. Once this administrative remedy is exhausted, the taxpayer may then bring a refund action in state court.

This is provided for in California Revenue and Taxation Code, Section 5140. This refund action may be brought only by the person who paid the tax, his guardian or conservator, the executor of his will, or the administrator of his estate, and the Act specifically provides may not be brought [p. 52] by any other person.

Because the venture, the joint venture which owns the building and not the plaintiff, paid the tax, plaintiff itself lacks standing to bring a refund action in state court. Plaintiff's inability to bring a refund action in its own name, however, does not necessarily render its state court remedy inadequate. As the United States Supreme Court stated in the *Alcan* case,

> "Plaintiff's inability to bring state court challenges in its own name is not determinative where, as here, it controls entities that can bring such challenges. To rule otherwise would he will elevate form over substance."

In the words of the Supreme court, the plaintiff here has a controlling interest in the joint venture which owns One Market Plaza, and it is possible that plaintiff could direct that the venture file a refund action in its own name.

In any case, because this matter arises in a challenge to the Court's subject matter jurisdiction, the plaintiff, as the party seeking to invoke that jurisdiction, bears the burden of proving that the Court has subject matter jurisdiction, and yet the plaintiff has, in this case, presented no evidence that it cannot, through the venture, pursue a state court remedy sufficient to obtain the relief which it seeks.

[p. 53] Now the Court needs to turn to the issue of whether or not exclusive federal jurisdiction over ERISA claims would deprive the state court of jurisdiction to decide the ERISA preemption issue, an argument upon which the plaintiff relies for the claim that this court must therefore take jurisdiction over the subject matter in the controversy at hand.

The plaintiff argues that if it brought its ERISA preemption claims in state court, the state court would have no jurisdiction and any judgment would be voidable at any time and offer no finality for any party. The Court disagrees with plaintiff's analysis.

In *Franchise Tax Board versus Construction Laborers* at 463 US 1, a 1983 decision, the Supreme Court held that a suit brought in state court by state tax authorities to enforce taxes against an ERISA covered employee benefit plan was improperly removed to federal court on federal question grounds.

The Supreme Court remanded the case to California state court and the California state court proceeded to resolve the ERISA preemption question.

The Supreme Court's remand strongly suggests that exclusive jurisdiction in ERISA actions does not bar a state court from resolving an ERISA preemption question when raised in state court.

Justice Scalia, writing as a circuit justice in *Barnes versus E-Systems, Inc.* at 112 Supreme Court 1, a 1991 [p. 54] reported decision, suggestions that state courts have jurisdiction to entertain a claim for monetary or equitable relief that rest on the invalidity under the Supremacy clause of a state statute that violates ERISA.

Because the state court does have jurisdiction to resolve the ERISA preemption question in this case, plaintiff, in the Court's view, has a plain, speedy and efficient remedy to challenge the tax in state court. The Tax Injunction Act therefore forecloses this Court from exercising jurisdiction over this action.

The defendant's motion under rule 12(b)(1) is therefore granted.

And I will ask that Counsel for the City and County prepare an appropriate form of judgment, and of course submit it first to counsel for the plaintiff.

MR. KOLM: Thank you, Your Honor.

THE COURT: All right. Thank you, counsel.

MR. FISCHER: Thank you, Your Honor.

(Proceedings concluded.)

STATE OF CALIFORNIA)
) ss.
COUNTY OF SANTA CLARA)

I, the undersigned, a Certified Shorthand Reporter of the State of California, hereby certify that the above proceedings were held at the time and place herein stated; that the statements by Counsel, The Court and other parties were reported by me, a Certified Shorthand Reporter and disinterested person, and were thereafter transcribed under my direction into typewriting, and that the foregoing is a full, complete and true record of said proceedings.

I further certify that I am not of counsel or attorney for either or any of the parties in the foregoing proceedings and caption named, nor am I in any way interested in the outcome of the cause named in said caption.

IN WITNESS WHEREOF, I have hereunto set my hand this 27th day of June 1995.

/s/ Lee-Anne Shortridge
LEE-ANNE SHORTRIDGE, CSR #9595

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§ 1131. Criminal penalties

Any person who willfully violates any provision of part 1 of this subtitle, or any regulation or order issued under any such provision, shall upon conviction be fined not more than $5,000 or imprisoned not more than one year, or both; except that in the case of such violation by a person not an individual, the fine imposed upon such person shall be a fine not exceeding $100,000.

(Pub.L. 93-406, title I, § 501, Sept. 2, 1974, 88 Stat. 891.)

29 U.S.C. § 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought –

(1) by a participant or beneficiary –

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), or (5) of subsection (c) of this section or under subsection (i) or (1) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title);

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection; or

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this subtitle or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract

or annuity, plus reasonable prejudgment interest on such amounts.

(b) Plans qualified under Internal Revenue Code; Maintenance of actions involving delinquent contributions

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of Title 26 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) of this section with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if –

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 1145 of this title.

(3) The Secretary is not authorized to enforce under this part any requirement of part 7 against a health insurance issuer offering health insurance coverage in connection with a group health plan (as defined in section 1191b(a)(1) of this title). Nothing

in this paragraph shall affect the authority of the Secretary to issue regulations to carry out such part.

(c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form

(1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title or section 1021(e)(1) of this title with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper. For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be treated as a separate violation.

(2) The Secretary may assess a civil penalty against any plan administrator of up to $1,000 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 1021(b)(4) of this title. For purposes of this paragraph, an annual report that has been rejected under

section 1024(a)(4) of this title for failure to provide material information shall not be treated as having been filed with the Secretary.

(3) Any employer maintaining a plan who fails to meet the notice requirement of section 1021(d) of this title with respect to any participant or beneficiary or who fails to meet the requirements of section 1021(e)(2) of this title with respect to any person may in the court's discretion be liable to such participant or beneficiary or to such person in the amount of up to $100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

(4) The Secretary may assess a civil penalty of not more than $1,000 for each violation by any person of section 1021(f)(1) of this title.

(5) The Secretary may assess a civil penalty against any person of up to $1,000 a day from the date of the person's failure or refusal to file the information required to be filed by such person with the Secretary under regulations prescribed pursuant to section 1021(g) of this title.

(6) The Secretary and the Secretary of Health and Human Services shall maintain such ongoing consultation as may be necessary and appropriate to coordinate enforcement under this subsection with enforcement under section 1320b-14(c)(8) of Title 42.

(d) Status of employee benefit plan as entity

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons,

subpoena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered,

where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan –

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of –

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

(h) Service upon Secretary of Labor and Secretary of Treasury

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty

In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of

such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section 4975(f)(4) of Title 26) for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of Title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of Title 26.

(j) Direction and control of litigation by Attorney General

In all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of Title 28), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor

Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this chapter, or to compel him to take action required under this subchapter, may be brought in the district court of the

United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

(l) **Civil penalties on violations by fiduciaries**

(1) In the case of –

(A) any breach of fiduciary responsibility under (or other violation of) part 4 by a fiduciary; or

(B) any knowing participation in such a breach or violation by any other person, the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1) –

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section.

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that –

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan (or to provide the relief ordered pursuant to subsection (a)(9) of this section) without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of Title 26.

(m) Penalty for improper distribution

In the case of a distribution to a pension plan participant or beneficiary in violation of section 1056(e) of this title by a plan fiduciary, the Secretary shall assess a penalty against such fiduciary in an amount equal to the value of the distribution. Such penalty shall not exceed $10,000 for each such distribution.

(Pub.L. 93-406, Title I, § 502, Sept. 2, 1974, 88 Stat. 891: Pub.L. 96-364, Title III, § 306(b), Sept. 26, 1980, 94 Stat. 1295.)